TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, [redacted] 1953

No. [redacted] 92

[redacted] STATES, APPELLANT

vs.

[redacted] WAREHOUSE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF FLORIDA

FILED MARCH 31, 1953
PROBABLE JURISDICTION NOTED MAY 25, 1953

Supreme Court of the United States

OCTOBER TERM, 1962

No. 942

UNITED STATES, APPELLANT

vs.

WIESENFELD WAREHOUSE COMPANY

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF FLORIDA

INDEX

[fol. 1]

IN THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA JACKSONVILLE DIVISION

F.D.C. No. 47122

[File Endorsement Omitted]

No. 12,256-Cr-J

(21 U.S.C. 331 and 333)

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY, a corporation

INFORMATION—filed July 19, 1962

COUNT I

The United States Attorney charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

10 LBS. NET WT.
LONG GRAIN RICE

Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

That thereafter, to wit, within the period from on or about April 28, 1961 to on about August 21, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

[fol. 2] That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent excreta, insects, insect larvae and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT II

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number

of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER MAID
10 LBS. NET WT.
RICE

Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

[fol. 3] That thereafter, to wit, within the period from on or about April 28, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT III.

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about January 6, 1961, receive at Jacksonville, State of Florida, a number [fol. 4] of packages of hamburger mix, a food, which said food had been shipped in interstate commerce from Millstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter;

10 OZ. NET WT.
GOLDEN DIPT
BURGER BOY
MIX FOR HAMBURGER
GOLDEN DIPT MANUFACTURING CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about January 6, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

[fol. 5] COUNT IV

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about May 24, 1961, receive at Jacksonville, State of Florida, a number of packages of breading mix, a food, which said food had been shipped in interstate commerce from Millstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter:

5 POUNDS NET WT.
GOLDEN DIPT
ALL PURPOSE
READY MIXED BREADING
GOLDEN DIPT MFG. CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about May 24, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said de-

fendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects, and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

[fol. 6] That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT V

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about July 24, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Co., Inc.;

That displayed upon said bags was certain labeling which consisted among other things, of the following printed and graphic matter:

10 LBS. NET WT.
MAHATMA
LONG GRAIN RICE

Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

That thereafter, to wit, within the period from on or about July 24, 1961 to on or about December 1, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

[fol. 7] That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent urine, insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said

food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT VI

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about September 6, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER
MAID
RICE
10 LBS. NET WT.

Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

[fol. 8] That thereafter, to wit, within the period from on or about September 6, 1961 to on or about December 4, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamina-

tion, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342 (a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

/s/ Edward F. Boardman

UNITED STATES ATTORNEY for the Southern District of Florida

By: /s/ William J. Hamilton, Jr.
Assistant United States Attorney

[fol. 9]

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

[File endorsement omitted]

No. 12,256-Cr-J

[Title omitted]

MOTION TO DISMISS INFORMATION—Filed August 2, 1962

Comes now the defendant, Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, Florida, by its undersigned attorneys, and moves the Court to dismiss information filed in this cause by the United States Attorney and each and every count therein contained, to wit: Count I, Count II, Count III, Count IV, Count V, and Count VI, upon the following grounds as to each and every count:

1. The information and each and every count therein contained do not state facts sufficient to constitute an offense under the laws of the United States.

2. The Statute upon which the information and each and every count therein contained are based, to wit: Title 21, United States Code, Sections 331 (K), 342 (a) (3) and (4), is unconstitutional as being so indefinite, uncertain, and obscure that it does not inform one accused thereunder of the nature and cause of the accusation in violation of the Sixth Amendment of the United States Constitution, and further said statute is unconstitutional as being a deprivation of life, liberty, and property without due process of law in violation of the Fifth Amendment of the United States Constitution.

/s/ James S. Taylor

ULMER, MURCHISON, KENT,
ASHBY & BALL
850 Florida National Bank Building
Jacksonville 2, Florida

[Certificate of service omitted in printing]

[fols. 10 - 11] * * *

[fol. 12]

IN UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA

[File endorsement omitted]

No. 12,256-Cr-J

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY, a corporation

ORDER GRANTING MOTION TO DISMISS—December 21, 1962

This cause was taken under advisement on October 19, 1962, on defendant's motion to dismiss made in open court. The plaintiff and defendant now having filed briefs, it appears that said motion should be granted.

21 U.S.C. 331 (k) prohibits the specific acts of alteration, mutilation, destruction, obliteration or removal of the labeling of, a food, drug, device or cosmetic. This enumeration of specific acts is followed by the general term, "or the doing of any other act." The information alleges that adulteration was caused by the defendant's act of holding certain food in its warehouse, which was accessible to rodents, birds and insects.

The government contends that one of the purposes of Congress in enacting Section 331(k) was to prohibit the holding of food after shipment in interstate commerce under insanitary conditions whereby such food may become contaminated with filth, and cites House Report No. 807, 80th Congress, 1st Session, July 8, 1947 at page 3:

[fol. 13] "As so amended the subsection will penalize among other acts resulting in adulteration or misbranding, the act of holding articles under unsanitary conditions whereby they become contaminated with filth or rendered injurious to health."

This not only makes one holding such goods an insurer but subjects him to criminal action. Under the rule of

construction known as *ejusdem generis*, where a general term follows an enumeration of specific classes of activities, the general term will be limited to the same general nature as those enumerated. The rule is applicable only where intent is not discoverable from the statutory language, and it may not be used to defeat the obvious purpose of legislation. *United States* v. *Alpers*, 338 U.S. 680 (1950). Congress may have intended the construction advocated by the prosecution, however, the statute, as it is presently written, is too vague and indefinite to to apply to the mere act of "holding" goods. In an effort to uphold the statute as constitutional, strict rules of construction must be applied; therefore the information does not allege an offense under Section 331(k), and it is thereupon:

ORDERED that defendant's motion to dismiss is granted.

DONE AND ORDERED in Chambers, at Jacksonville, this 21st day of December, 1962.

/s/ Bryan Simpson
UNITED STATES DISTRICT JUDGE

United States Attorney (3)
(Hamilton)

Ulmer, Murchison, Kent, Ashby & Ball

[fol. 14] No. 12, 256-Cr-J.

CRIMINAL DOCKET

IN UNITED STATES DISTRICT COURT

(Title of Case)

THE UNITED STATES

vs.

WIESENFELD WAREHOUSE COMPANY, a corporation

(Attorneys)

For U.S.:

Wm. J. Hamilton, Jr.

For Defendant:

Ulmer, Murchison, Kent, Ashby, & Ball
Jacksonville, Fla.

(James Taylor)

(Statistical Record)	(Costs)
J.S. 2 mailed 7-19-62	Clerk
J.S. 3 mailed 12-21-62	Marshal
Violation Contaminated food	Docket fee
Title 21, U. S. C.	
Secs. 331, and 333	

(Date)	DOCKET ENTRIES
July 19, 1962	Information filed
July 23	Praecipe for Summons
July 28	Summons Issued
Aug. 2	Motion to Dismiss Information
Aug. 3	Arraigned and Plead Not Guilty to all Counts

(Date)	DOCKET ENTRIES (Continued)
Oct. 19	Hearing in Open Court on Motion to Dismiss—Taken under advisement by Court
Nov. 13	Application to Transfer, Order Removing to Middle District and Order Assigning for Trial
Dec. 21	Order Granting Defendant's Motion to Dismiss R-23 (BS)
Jan. 18, 1963	Notice of Appeal to the Supreme Court of the United States

[fol. 15]

IN UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
JACKSONVILLE DIVISION

[File endorsement omitted]

No. 12,256-Cr-J

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY, *a corporation*

NOTICE OF APPEAL TO THE SUPREME COURT OF THE UNITED STATES—filed January 18, 1963

I

NOTICE IS HEREBY GIVEN that the United States of America appeals to the Supreme Court of the United States from the Order dated and entered December 21, 1962, dismissing the Information which charged the defendant in six counts with violations of Title 21, United States Code, Section 331(k). This appeal is taken pursuant to Title 18, United States Code, Section 3731.

II

The Clerk will please prepare a transcript of the record for transmission to the Clerk of the Supreme Court of the United States and include therein the following:

1. Transcript of docket entries.
2. Information filed July 19, 1962.
3. Motion to dismiss filed October 19, 1962.
4. Order granting motion to dismiss dated and entered December 21, 1962.
5. This notice of appeal to the Supreme Court of the United States.

[fol. 16] III

The following question is presented by this appeal:

Whether an information which alleges that a public warehouse company received an article of food which had been shipped in interstate commerce; that thereafter, while the food was being held for sale, the company caused the food to be held in a building that was accessible to rodents, birds, and insects and thereby caused the food to be exposed to contamination from these sources; and that the act of causing the food to be so held resulted in the food's being adulterated in that it consisted in part of a filthy substance and in that it was held under insanitary conditions whereby it may have become contaminated with filth, charges "the doing of any other act" which constitutes a violation of 21 U.S.C. 331(k).

EDWARD F. BOARDMAN
United States Attorney

By /s/ WILLIAM J. HAMILTON, JR.
Assistant United States Attorney

[Acknowledgment of service omitted in printing]

[fol. 17] [Clerk's Certificate to foregoing transcript omitted in printing]

[fol 18]

SUPREME COURT OF THE UNITED STATES

No. 942, October Term, 1962

UNITED STATES, APPELLANT

vs.

WIESENFELD WAREHOUSE COMPANY

ORDER NOTING PROBABLE JURISDICTION—May 20, 1963

APPEAL from the United States District Court for the Middle District of Florida.

The statement of jurisdiction in this case having been submitted and considered by the Court, probable jurisdiction is noted and the case is placed on the summary calendar.

☆ U. S. GOVERNMENT PRINTING OFFICE: 1963 68080G 1243

INDEX

CITATIONS

Cases:

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In the Supreme Court of the United States

OCTOBER TERM, 1962

No. —

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

JURISDICTIONAL STATEMENT

OPINION BELOW

The order of the district court dismissing the information (Appendix A, *infra*, pp. 9–10; R. 12–13), is not reported.

JURISDICTION

On December 21, 1962, the district court dismissed the information on the ground that it did not allege an offense under Section 301(k) of the Federal Food, Drug and Cosmetic Act, 21 U.S.C. 331(k) (R. 12–13). A notice of appeal to this Court was filed in the district court on January 18, 1963 (R. 15–16). The jurisdiction of this Court to review on direct appeal a judgment dismissing an information on the ground that it does not charge an offense within the meaning

of the statute upon which the information is founded rests upon 18 U.S.C. 3731.

QUESTION PRESENTED

Whether the storage by a public warehouse of food (that had been shipped in interstate commerce) under insanitary conditions, so that the food was exposed to and contaminated by filth, violated Section 301(k) of the Federal Food, Drug, and Cosmetic Act.

STATUTE INVOLVED

Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended:

> Section 301 [21 U.S.C. 331]. The following acts and the causing thereof are prohibited:
>
> * * * * *
>
> (k) The alteration, multilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> Section 402. [21 U.S.C. 342]. A food shall be deemed to be adulterated—
>
> (a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or where-

by it may have been rendered injurious to health; * * *

* * * * *

STATEMENT

The appellee, a public storage warehouse, was charged by criminal information with six violations of Section 301(k) of the Federal Food, Drug, and Cosmetic Act [21 U.S.C. 331(k)]. That section prohibits, *inter alia*, "the doing of any other act with respect to, a food * * * if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated." The six counts differed only with respect to the particular shipment or product involved. In substance, each count charged (1) that the appellee had received an article of food which had been shipped in interstate commerce; (2) that while this article was being held for sale the appellee caused it to be held in a building that was accessible to rodents, birds, and insects, thus exposing the food to contamination; (3) that the food thereby became adulterated within the meaning of 21 U.S.C. 342(a)(3) and 342(a)(4), in that it consisted in part of a filthy substance due to the presence therein of rodent excreta, insects, insect larvae and insect pupae (subsection (3)), and was held under insanitary conditions whereby it may have become contaminated with filth (subsection (4)) (App. B., *infra*, pp. 11–21; R. 1–8).

The district court granted a motion to dismiss the information (App. A, *infra*, pp. 9–10; R. 12–13).

The court ruled that "the statute, as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods." It held that under the rule of *ejusdem generis* the words "the doing of any other act" in Section 301(k) must be limited to acts of "the same general nature" as those specifically prohibited, namely, acts involving the labeling of articles (App. A, *infra*, p. 10; R. 13).

THE QUESTION IS SUBSTANTIAL

The holding of the court below that Section 301(k) does not prohibit the storage of food under insanitary conditions whereby it becomes or may become contaminated with filth is contrary to both the clear language of the statute and its legislative history. The decision denies the public protection in an important matter of health regulation.

1. Section 301(k) prohibits—

> the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act * * * results in such article being adulterated or misbranded.

Section 402 provides that a food shall be deemed "adulterated"—if it has been—

> * * * held under insanitary conditions whereby it may have become contaminated with filth * * *.

Reading the definition of "adulterated" back into Section 301(k), the latter section plainly prohibits—

> the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act * * * results in such article being held under insani-

> tary conditions whereby it may have become contaminated with filth * * *.

Thus, the words of the statute plainly cover the present case.

The district court held that the words "the doing of any other act" reach only acts that relate to the labeling of products because the other activities prohibited by Section 301(k)—"alteration, mutilation, destruction, obliteration or removal"—pertain only to the labeling. The reasoning misconceives the grammatical structure of Section 301(k). For while the terms last quoted explicitly refer to labeling, the phrase "the doing of any other act" speaks of an act "with respect to, a food, drug, device, or cosmetic." Furthermore, the district court's construction would make the statute virtually inoperative in the field of adulteration—a concept that involves the content or condition of the product and not the accuracy or adequacy of the labeling.

The legislative history of the Act shows that Congress explicitly intended to reach the storage of foods under insanitary conditions which resulted in their becoming contaminated. Prior to 1948, Section 301(k), although phrased in the same language as the present statute, prohibited only misbranding. The House Committee report on the 1948 amendment stated (H. Rep. No. 807, 80th Cong., 1st Sess., p. 3, emphasis added) that by

> amend[ing Section 301(k)] so as to cover adulteration as well as misbranding * * * *the subsection will penalize,* among other acts resulting

> in adulteration or misbranding, *the act of holding articles under insanitary conditions whereby they may become contaminated with filth or rendered injurious to health.*

The legislative history also makes it clear that Congress did not intend "the broad phrase 'any other act with respect to' the article" to be "limited by the preceding enumeration of forbidden acts with respect to the labeling * * *. [U]nder the subsection as now in force the rule of *ejusdem generis* would not apply in interpreting the words 'or the doing of any other act * * *', and it is even more clear that this rule will not apply in the interpretation of the subsection as amended by this bill" (*id.*, pp. 3–4). The Committee was apparently referring to this Court's decision in *United States* v. *Sullivan*, 332 U.S. 689. There the Court, in construing Section 301(k) when it prohibited only misbranding, refused to apply the rule of *ejusdem generis* to limit the words "any other act" to acts relating to labeling. The Court held that the transfer of a drug from a properly labeled container to an improperly labeled one constitutes "the doing of any * * * act" which resulted in the drug being misbranded, even though, as the dissenting opinion pointed out (332 U.S. 705, 707), such act was not related to "alteration, mutilation, destruction, obliteration, or removal" of any part of a label.[1]

[1] Following *Sullivan*, several courts of appeals similarly held in misbranding cases that the words "the doing of any other act" were not limited to acts relating to labeling. *United States* v. *2600 State Drugs*, 235 F. 2d 913 (C.A. 7), certiorari denied, 352 U.S. 843; *United States* v. *Carlisle*, 234 F. 2d 196 (C.A. 5),

The district court erred in ruling that the statute is "too vague and indefinite" to cover the act of storage. The arguments previously made demonstrate that Section 301(k) gave the appellee fair warning that the conduct with which it was charged—the holding of food under insanitary conditions which led to its contamination—constituted "the doing of any * * * act" which resulted in the food being adulterated. Cf. *United States* v. *National Dairy Products Corp.*, No. 18, this Term, decided February 18, 1963.

2. The question is plainly important in the administration of the Federal Food, Drug and Cosmetic Act. The Food and Drug Administration has advised that approximately 20 percent of its criminal cases involve contamination resulting from storage of food under insanitary conditions.[2] The strong public interest in protection against exposure to contaminated food calls for review and reversal of a decision which, if allowed to stand, would have such an obviously deleterious effect upon the public health.

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certiorari denied, 352 U.S. 841; *Archambault* v. *United States*, 224 F. 2d 925 (C.A. 10); *United States* v. *H. Wool & Sons, Inc.*, 215 F. 2d 95 (C.A. 2); *United States* v. *El-O-Pathic Pharmacy*, 192 F. 2d 62 (C.A. 9).

[2] For the fiscal years ended June 30, 1960 and 1961, the total number of such cases was: 1960, 240 cases involving 1383 violations; 1961, 232 cases involving 1532 violations. Annual Report of the Attorney General of the United States for the Fiscal Year Ended June 30, 1960, p. 224; *id.*, for the year ended June 30, 1961, p. 228. For the fiscal year ending June 30, 1962, the records of the Department of Justice show a total of 257 cases involving 1536 violations.

679234—63——2

CONCLUSION

This appeal presents a substantial question involving protection of the public health. Probable jurisdiction should be noted.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.
HERBERT J. MILLER, JR.,
Assistant Attorney General.
BEATRICE ROSENBERG,
EUGENE P. MILLER,
Attorneys.

MARCH 1963.

APPENDIX A

AN ORDER DISMISSING INFORMATION

United States District Court
Southern District of Florida

No. 12,256–Cr–J

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY,
a corporation.

Order Granting Motion To Dismiss

This cause was taken under advisement on October 19, 1962, on defendant's motion to dismiss made in open court. The plaintiff and defendant now having filed briefs, it appears that said motion should be granted.

21 U.S.C. 331(k) prohibits the specific acts of alteration, mutilation, destruction, obliteration or removal of the labeling of, a food, drug, device or cosmetic. This enumeration of specific acts is followed by the general term, "or the doing of any other act." The information alleges that adulteration was caused by the defendant's act of holding certain food in its warehouse, which was accessible to rodents, birds and insects.

The government contends that one of the purposes of Congress in enacting Section 331(k) was to prohibit the holding of food after shipment in interstate commerce under insanitary conditions whereby such food may become contaminated with filth, and cites

House Report No. 807, 80th Congress, 1st Session, July 8, 1947 at page 3:

> "As so amended the subsection will penalize among other acts resulting in adulteration or misbranding, the act of holding articles under unsanitary conditions whereby they become contaminated with filth or rendered injurious to health."

This not only makes one holding such goods an insurer but subjects him to criminal action. Under the rule of construction known as *ejusdem generis*, where a general term follows an enumeration of specific classes of activities, the general term will be limited to the same general nature as those enumerated. The rule is applicable only where intent is not discoverable from the statutory language, and it may not be used to defeat the obvious purpose of legislation. *United States* v. *Alpers*, 338 U.S. 680 (1950). Congress may have intended the construction advocated by the prosecution, however, the statute, as it is presently written, is too vague and indefinite to apply to the mere act of "holding" goods. In an effort to uphold the statute as constitutional, strict rules of construction must be applied; therefore the information does not allege an offense under Section 331(k), and it is thereupon:

> ORDERED that defendant's motion to dismiss is granted.
>
> DONE AND ORDERED in Chambers, at Jacksonville, this *21st* day of December, 1962.
>
> Original signed:
>
> /S/ BRYAN SIMPSON,
> UNITED STATES DISTRICT JUDGE.

United States Attorney (3)
(Hamilton)
Ulmer, Murchison, Kent, Ashby & Ball

APPENDIX B

INFORMATION

F.D.C. No. 47122

In the United States District Court for the Southern District of Florida Jacksonville Division

No. —

(21 U.S.C. 331 and 333)

UNITED STATES OF AMERICA

v.

WIESENFELD WAREHOUSE COMPANY, A CORPORATION

COUNT I

The United States Attorney charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

10 LBS. NET WT.
LONG GRAIN
RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

That thereafter, to wit, within the period from on or about April 28, 1961 to on or about August 21, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent excreta, insects, insect larvae and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT II

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about April 28, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Rayne, Louisiana, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER MAID
10 LBS. NET WT.
RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana

That thereafter, to wit, within the period from on or about April 28, 1961 to on or about August 22, 1961, and while said food was being held for sale

after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342 (a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT III

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the

State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about January 6, 1961, receive at Jacksonville, State of Florida, a number of packages of hamburger mix, a food, which said food had been shipped in interstate commerce from Milstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter;

10 OZ. NET WT.
GOLDEN DIPT
BURGER BOY
MIX FOR
HAMBURGER
GOLDEN DIPT MANFACTURING CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about January 6, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to con-

tamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342 (a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT IV

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about May 24, 1961, receive at Jacksonville, State of Florida, a number of packages of breading mix, a food, which said food had been shipped in interstate commerce from Millstadt, Illinois, by Golden Dipt Manufacturing Co.;

That displayed upon said packages was certain labeling which consisted, among other things, of the following printed and graphic matter:

5 POUNDS NET WT.
GOLDEN DIPT
ALL PURPOSE
READY MIXED
BREADING
GOLDEN DIPT MFG. CO.
ST. LOUIS 10, MO.

That thereafter, to wit, within the period from on or about May 24, 1961 to on or about August 22, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of packages of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, and insect pupae;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insani-

tary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT V

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about July 24, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Co., Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

10 LBS. NET WT.
MAHATMA
LONG GRAIN RICE
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

That thereafter, to wit, within the period from on or about July 24, 1961 to on or about December 1, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of rodent urine, insects, insect larvae, insect pupae, and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

COUNT VI

The United States Attorney further charges:

That Wiesenfeld Warehouse Company, a corporation

organized and existing under the laws of the State of Florida, and trading and doing business at Jacksonville, State of Florida, the defendant herein did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, on or about September 6, 1961, receive at Jacksonville, State of Florida, a number of bags of rice, a food, which said food had been shipped in interstate commerce from Carlisle, Arkansas, by Louisiana State Rice Milling Company, Inc.;

That displayed upon said bags was certain labeling which consisted, among other things, of the following printed and graphic matter:

WATER
MAID
RICE
10 LBS. NET WT.
Louisiana State Rice Milling Company, Inc.
Abbeville, Louisiana
and subsidiary
Arkansas State Rice Milling Co.
Carlisle, Arkansas

That thereafter, to wit, within the period from on or about September 6, 1961 to on or about December 4, 1961, and while said food was being held for sale after shipment in interstate commerce, as aforesaid, the said defendant did, at Jacksonville, State of Florida, within the Jacksonville Division of the Southern District of Florida, cause a number of bags of said food to be held in a building that was accessible to rodents, birds, and insects and did cause said food to be exposed to contamination by rodents, birds, and insects;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being adulterated within the meaning of 21 U.S.C. 342(a)(3), in that said food consisted in part of a filthy substance by reason of the presence therein of insects, insect larvae, insect pupae and insect cast skins;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, resulted in said food being further adulterated within the meaning of 21 U.S.C. 342(a)(4), in that said food was held under insanitary conditions whereby it may have become contaminated with filth;

That said act of causing said food to be held in said building, as aforesaid, and to be exposed to contamination, as aforesaid, was an act caused to be done by said defendant while said food was being held for sale after shipment in interstate commerce, which resulted in said food being adulterated, as aforesaid, in violation of Title 21, United States Code, Section 331(k).

(S) EDWARD F. BOARDMAN,
United States Attorney for the Southern District of Florida.

By: WILLIAM J. HAMILTON, Jr.,
Assistant United States Attorney.

U.S. GOVERNMENT PRINTING OFFICE: 1963

No. [redacted] 92

In the Supreme Court of the United States

OCTOBER TERM, 1962

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

CLARENCE G. ASHBY
JAMES S. TAYLOR
850 Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellee.

INDEX

CITATIONS

No. —

OCTOBER TERM, 1962

In the Supreme Court of the United States

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY, APPELLEE

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

MOTION TO AFFIRM

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the final judgment and decree of the District Court be affirmed on the ground that the question is so unsubstantial as not to warrant further argument.

QUESTIONS PRESENTED

QUESTION ONE

WHERE FOOD HAS BEEN SHIPPED IN INTERSTATE COMMERCE, DOES SECTION 301(k) OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT (21 U.S.C. 331(k)) PROHIBIT MERE POSSESSION OF SUCH FOOD BY A BAILEE IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS WHERE THE BAILEE DOES NOT HAVE KNOWL-

EDGE OF THE PRESENCE OF SUCH PESTS IN SUCH BUILDING?

QUESTION TWO

IF MERE POSSESSION OF SUCH FOOD IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS IS PROHIBITED WITHOUT REGARD TO THE FREEDOM FROM FAULT OR KNOWLEDGE OF THE POSSESSOR, DOES THE STATUTE DEFINE THE PROHIBITED ACTIVITY WITH SUFFICIENT CERTAINTY TO CONVEY A DEFINITE WARNING TO A PERSON OF ORDINARY INTELLIGENCE?

STATEMENT

This is a direct appeal from the final judgment and decree entered on October 22, 1962, by the United States District Court for the Southern District of Florida, dismissing an information filed against the Appellee for violation of Title 21, U.S. Code 331(k).

The Appellee is a public storage warehouse. It is charged with a violation of Title 21, U.S. Code 331(k), which prohibits:

> "The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded."

The information charges that the holding of food by the defendant in a building which is "accessible to rodents, birds

and insects" constitutes a violation of the above quoted statute. The District Court granted a motion to dismiss the information and from that order the United States of America appeals.

ARGUMENT

QUESTION ONE

WHERE FOOD HAS BEEN SHIPPED IN INTERSTATE COMMERCE, DOES SECTION 301(k) OF THE FEDERAL FOOD, DRUG AND COSMETIC ACT (21 U.S.C. 331(k)) PROHIBIT MERE POSSESSION OF SUCH FOOD BY A BAILEE IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS WHERE THE BAILEE DOES NOT HAVE KNOWLEDGE OF THE PRESENCE OF SUCH PESTS IN SUCH BUILDING?

The information here alleges only that food was held by a public storage warehouse which was accessible to rodents, birds and insects, and was thereby exposed to contamination. This, the Government argues, is an insanitary condition and the holding of food under such conditions constituted a crime.

It is submitted that every building, save only one without doors, windows or other openings, is "accessible to rodents, birds and insects." A warehouse, of course, must have means of access, and ordinarily it is impossible to keep the access openings closed or protected during the hours when goods are being received or discharged from the warehouse. Thus, by the very nature of the warehouse industry, and regardless of the extent of precautionary measures taken to assure sanitary conditions within the warehouse, every warehouse in the land is, and must be accessible to rodents, birds and insects, and as

a result thereof, any time food is stored in such a place, it is, and must be exposed to contamination by such pests. This is so regardless of the extent of measures taken by the warehouseman to protect the premises from invasion by such pests.

The Government's contention here appears to be that a warehouseman must bear criminal responsibility for circumstances completely and totally beyond his control if food may become contaminated while in his possession. The natural consequence of such a position is that if food at any time in fact becomes contaminated, the possessor of that food is guilty of a crime. If Congress, intended such a far-reaching result, its intent has not been communicated by the words of the statute.

Congress has forbidden "the adulteration, mutilation, destruction, obliteration, or removal" of labels on foods in interstate commerce, or "the doing of any other act with respect to a food" while it is held for sale, if the doing of that act results in the article becoming adulterated.

In the opinion of the District Court, the phrase "the doing of any other act" must be qualified and restricted to the same general type of activity which is specifically prohibited. Contrary to the argument of the Government in the Jurisdictional Statement, the Court below did not hold, and it is not now and never has been the contention of this defendant that "the doing of any other act" is restricted to acts related to labeling. It is contended only that each of the named classes of acts prohibited by the statute imply a specific activity, or some affirmative action, on the part of the person the statute was intended to prohibit from the doing of such act. The clear meaning of the statute is that no one shall affirmatively do anything to a food which would result in its becoming adulterated. Mere possession of that

food under the circumstances alleged in the information does not constitute a crime.

The basic principles of statutory construction require that where a general term follows an enumeration of specific classes of activity, the general term will be limited to the same general classes of activity as those enumerated. 82 Corpus Juris Secundum, *Statutes*, Section 332(b). Since the specific acts prohibited by the statute each imply some positive activity, the general term "doing of any other act" must be limited in its meaning to some positive type of activity. Here the Government charges only that the food was held in a building which was "accessible to rodents, birds and insects." There is no charge that the defendant did anything with respect to the food other than to possess it.

Furthermore, the statute requires that for criminal responsibility to attach, the food must be "held for sale." It is conceded by the Government here that this defendant did not hold the food for sale, for the defendant was a mere bailee having only naked possession of the food. The Government contends that the term "held for sale" really means "in the hands of any one other than the ultimate consumer." If Congress had intended such a meaning, it would have been an easy matter to say so. Such a construction is not indicated either by the act or by its legislative history.

The term "held" in ordinary usage implies a degree of ownership — something more than mere possession of someone else's goods as a bailee. *Howell v. Commissioner of Internal Revenue*, 140 F.2d 765. See also 40 *Corpus Juris Secundum* 406. Here the defendant claims no ownership in the food. It was not holding the food for sale. For all that appears in the information, it did not even know whether or not its customer held the food for sale.

It is submitted that the statute, when properly construed,

so obviously does not encompass the acts alleged in the information to have been committed by the defendant as to require no further argument before this Court.

QUESTION TWO

IF MERE POSSESSION OF SUCH FOOD IN A BUILDING WHICH IS ACCESSIBLE TO RODENTS, BIRDS AND INSECTS IS PROHIBITED WITHOUT REGARD TO THE FREEDOM FROM FAULT OR KNOWLEDGE OF THE POSSESSOR, DOES THE STATUTE DEFINE THE PROHIBITED ACTIVITY WITH SUFFICIENT CERTAINTY TO CONVEY A DEFINITE WARNING TO A PERSON OF ORDINARY INTELLIGENCE?

The question of vagueness or uncertainty in criminal statutes has been considered by this Court in a multitude of cases from which has been derived a series of tests or standards of construction which should be applied in determining whether or not a criminal statute is so vague as to offend the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322, this Court said that in order for a penal statute to be valid,

> "The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another." (Emphasis supplied)

In *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888, this Court said:

> "No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law."

The Government in its Jurisdictional Statement, has placed some reliance on the decision of this Court, in *United States v. National Dairy Products Corp.*, No. 18, this Term, decided February 18, 1963. In that case, the Supreme Court upheld the validity of Section 3 of the Robinson-Patman Act, which prohibits the sale of goods at "unreasonably low prices for the purpose of destroying competition." The Court pointed out, however:

> "We think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330 (1945) in which a requirement of intent served to 'relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware."

In both the Screws' case, referred to in the citation above, and the *National Dairy Products Corp.* case, the element of intent required by the statute and alleged in the informations, supplied the necessary specificity of warning. In the instant case, the element of intent is lacking, and therefore to be sustained the statute must be so clear on its face that one acting without intent will be apprised of its prohibitions.

It is submitted that in reading Section 301(k) which by its terms requires the doing of an act with respect to a food while

it is held for sale, a person of normal intelligence would assume that he must *do* something to a food that *he* is holding for sale before criminal responsibility would fall upon him.

The Government relies also upon *United States v. Sullivan*, 332 U.S. 689, where this Court in a divided opinion, held that Section 301(k) was sufficiently definite to withstand a constitutional objection when applied to a druggist who held drugs for sale when it appeared that the druggist had removed pills from a labeled bottle and put them into an unlabeled box. That case involved an affirmative act done to a drug by a person who held it for sale. It is interesting to note Mr. Justice Frankfurter's comments in his dissenting opinion that:

> "If it takes nine pages (of the majority opinion) to determine the scope of a statute, its meaning can hardly be so clear that he who runs may read, or that even he who reads may read. Generalities regarding the effect to be given to the 'clear meaning' of a statute do not make the meaning of a particular statute clear."

We do not contend here that the statute is unconstitutional in its abstract sense. It is the application of the statute to this defendant under the circumstances alleged in the information here involved which is objected to. It is submitted that one of ordinary intelligence would not and could not read into the words of the statute the imposition of absolute criminal liability on a bailee when he holds food in a warehouse which is "accessible" to rodents.

CONCLUSION

In conclusion, it should be noted that the United States has ample power and authority to protect the stream of interstate commerce from pollution by adulterated foods by vigorous use of the seizure provisions of Section 304(a) of the Food,

Drug and Cosmetic Act (21 U.S.C. 334(a)). That section clearly and unequivocally grants to the Government the power to seize adulterated foods in the stream of commerce. But the Government here seeks to impose severe criminal sanctions against bailee of food whose only fault is that his building is "accessible to" pests and who is, by the very nature of his business, powerless to avoid that condition regardless of the care and precautionary measures he may take to protect his building against invasion by such pests.

It appears that the United States, in this case, is attempting to extend the power of the Food and Drug Administration to dangerous limits not stated in or contemplated by the Act. If every person who has possession of food which at any time has been in interstate commerce, becomes guilty of a crime when that food accidentally becomes contaminated without any affirmative act on the part of the possessor, then Congress should so state in language sufficiently definite to apprise us all of our potential criminal responsibility. It is submitted that the contentions of the the Government here are so baseless and unsubstantial as to require no further argument before this Court, and the Judgment appealed from should be affirmed.

Respectfully submitted,

CLARENCE G. ASHBY
JAMES S. TAYLOR
850 Florida National Bank Building
Jacksonville, Florida

Attorneys for Appellee.

PROOF OF SERVICE

I, Clarence G. Ashby, attorney for Wiesenfeld Warehouse Company, Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the ..... day of April, 1963 I served copies of the foregoing Motion to Affirm on the Appellant, the United States of America, by mailing copies thereof in a duly addressed envelope with airmail postage prepaid to Archibald Cox, Solicitor General, United States of America, Department of Justice, Washington 25, D.C., attorney of record for Appellant.

Attorney for Appellee

In the Supreme Court of the United States

OCTOBER TERM, 1962

No. 942

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF IN OPPOSITION TO MOTION TO AFFIRM

Appellee attempts to uphold the district court's dismissal of the information on a ground not relied on by the district court. Appellee argues that when the food became contaminated it was not being "held for sale" within the meaning of Section 301(k) of the Federal Food, Drug and Cosmetic Act because appellee, as a warehouseman, merely had possession of, but not title to, the food. The suggestion, therefore, is that the Act's criminal prohibitions apply only to contamination of food in the hands of a seller, but not in the hands of a storer.

Both the language and purpose of the statute refute this contention. The statute broadly prohibits the "doing of any other act with respect to, a food * * * if * * * done while such article is held for sale * * * and results in such article being adulterated * * *." Food is "held for sale" within the meaning of this provision if it is being held preliminary to or in preparation for its ultimate resale; the phrase is not limited to food in the hands of its actual seller. The limitation which appellee would read into the statute is inconsistent with the definition of adulterated food in Section 402(a)(4) as including, among other things, food which has been "held under insanitary conditions" whereby it has become contaminated with filth or rendered injurious to health. To hold that the Act does not apply to food which becomes adulterated while being held by a warehouseman would deny the public protection against contamination during the substantial periods for which food often is stored pending its distribution to the public. Such a limited reading of the statute would defeat the congressional purpose to safeguard the consumer from the time that food is introduced into the channels of interstate commerce to the point that it is delivered to the ultimate consumer. See *United States* v. *Dotterweich*, 320 U.S. 277.

Respectfully submitted.

ARCHIBALD COX,
Solicitor General.

MAY, 1963.

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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 92

UNITED STATES OF AMERICA, APPELLANT

v.

WIESENFELD WAREHOUSE COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF FLORIDA

BRIEF FOR THE APPELLANT

OPINION BELOW

The order of the district court dismissing the information (R. 11-12) is reported at 217 F. Supp. 638.

JURISDICTION

On December 21, 1962, the district court dismissed the information on the ground that it did not allege an offense under Section 301(k) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 331(k) (R. 11-12). A notice of appeal to this Court was filed in the district court on January 18, 1963 (R. 15-16).

This Court noted probable jurisdiction on May 20, 1963 (R. 17). The jurisdiction of this Court to review on direct appeal a judgment dismissing an information on the basis of a construction of the underlying statute rests upon 18 U.S.C. 3731.

QUESTION PRESENTED

Whether Section 301(k) of the Federal Food, Drug and Cosmetic Act condemns the storage of food (after interstate shipment and before sale to the ultimate consumer) by a public warehouseman in an insanitary place where it may become contaminated with filth.

STATUTE INVOLVED

The Federal Food, Drug, and Cosmetic Act, 52 Stat. 1040, as amended, 21 U.S.C. 301, *et seq.*, provides in pertinent part as follows:

> *Section 301* [*21 U.S.C. 331*]. The following acts and the causing thereof are hereby prohibited:
>
> * * *
>
> (k) The alteration, mutilation, destruction, obliteration, or removal of the whole or any part of the labeling of, or the doing of any other act with respect to, a food, drug, device, or cosmetic, if such act is done while such article is held for sale (whether or not the first sale) after shipment in interstate commerce and results in such article being adulterated or misbranded.
>
> * * *

Section 402 [*21 U.S.C. 342*]. A food shall be deemed to be adulterated—

(a) * * * (3) if it consists in whole or in part of any filthy, putrid, or decomposed substance, or if it is otherwise unfit for food; or (4) if it has been prepared, packed, or held under insanitary conditions whereby it may have become contaminated with filth, or whereby it may have been rendered injurious to health; * * *

STATEMENT

The appellee, a public storage warehouseman, was charged by criminal information with six violations of Section 301(k) of the Federal Food, Drug, and Cosmetic Act, 21 U.S.C. 331(k), *supra*. The six counts differed only with respect to the particular shipment or product involved. In substance, each count charged (1) that the appellee had received an article of food (rice, hamburger mix, and breading mix) which had been shipped in interstate commerce; (2) that, while this food was being held for sale, the appellee caused it to be held in a building that was accessible to rodents, birds, and insects, thus exposing it to contamination with filth; and (3) that the food thereby became adulterated within the meaning of Section 402(a) of the Act, 21 U.S.C. 342(a), *supra*, in that it consisted in part of a filthy substance due to the presence therein of rodent excreta, insects, insect larvae and insect pupae (subsection (3)), and in that it was held under insanitary conditions where it may have become contaminated with filth (subsection (4)), (R. 1-9).

The district court granted a motion to dismiss the information (R. 11-12). The court ruled that, although Congress may have intended to proscribe the type of conduct charged here, "the statute, as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods". The court held that under the rule of *ejusdem generis* the words "the doing of any other act" in Section 301(k) must be limited to acts of "the same general nature" as those specifically enumerated, namely, acts relating to the alteration, mutilation, destruction, obliteration or removal of the labeling of articles (R. 12).

SUMMARY OF ARGUMENT

The district court held that storing food which has been shipped in interstate commerce under insanitary conditions which may lead to its contamination is not an offense condemned by the Federal Food, Drug and Cosmetic Act. That result is compelled, the court below reasoned, because the prohibition of Section 301(k) against * * * "the doing of any * * * act with respect to, a food * * * [which] results in such article being * * * contaminated" is unconstitutionally vague unless restricted by the rule of *ejusdem generis* to acts like the label-defacing offenses proscribed by the same subsection.

For answer, we show, first, that the rule of *ejusdem generis* is wholly inapplicable in the present context. Not only does the legislative history disclose that Congress rejected explicitly any such narrow view, but the text of Section 301(k) and the differing

nature of the labeling and adulteration offenses conclusively refute the suggestion that the scope of the one controls the other. It does not follow, however, that the condemnation of acts resulting in adulteration is so general as to fail to give notice of what conduct is prohibited. On the contrary, other related sections of the statute specify the proscribed acts, including the offense charged here— holding food under such insanitary conditions that it may become contaminated with filth. Finally, we deal with the suggestion that the prohibition of Section 301(k) is addressed only to the *owner* of the regulated product and therefore does not reach a public warehouseman. This view has no basis in the text of the statute and contravenes the plain intent of Congress as revealed by an explicit legislative history.

ARGUMENT

Section 301(k) of the Federal Food, Drug and Cosmetic Act Condemns the Storage of Food Under Insanitary Conditions After Interstate Shipment and, So Construed, Is Not Unconstitutionally Vague.

A. *The rule of "ejusdem generis" is inapplicable.*

Section 301(k) of the Federal Food, Drug and Cosmetic Act of 1938, as amended in 1948, defines two distinct crimes with respect to foods held for sale after interstate shipment. On the one hand, it prohibits "the alteration, mutilation, destruction, obliteration, or removal" of the *label*, or "the doing of any other act with respect to" the product which "results in such article being * * * *misbranded*" (emphasis added). Such was the original section which

this Court construed in *United States* v. *Sullivan*, 332 U.S. 689. But, now, in addition to the labeling offense, Section 301(k) also proscribes "the doing of any * * * act with respect to" the product which "results in such article being *adulterated*" (emphasis added). That is the charge here.

Adulteration of food held for sale thus became a new and separate offense. While there may be some occasional overlapping between the two offenses, as where the removal of a portion of the contents from a food container and the substitution of another substance may make the product both adulterated (§ 402(b), 21 U.S.C. 342(b)) and misbranded (§ 403(a), (g)-(i), 21 U.S.C. 343(a), (g)-(i)), for the most part acts resulting in misbranding and acts resulting in adulteration are wholly distinct. Insofar as it condemns misbranding, Section 301(k) is concerned with a misrepresentation of the product through its label, or lack of label. See §§ 403, 502, 602; 21 U.S.C. 343, 352, 362. Insofar as it condemns acts resulting in adulteration, the Section is concerned with deterioration or contamination of the commodity itself. See §§ 402, 501, 601; 21 U.S.C. 342, 351, 361. In the first case, the emphasis is on protecting the buyer from misrepresentation; in the second, the primary concern is the public health.

In light of the distinction between the two offenses, it is very difficult to understand the argument that Section 301(k) should be read as prohibiting only those acts resulting in adulteration which are "like" those which result in misbranding. Still more difficult is the suggestion that the section condemns only

those acts of adulteration which are like the enumerated offenses with reference to the *labeling* of the container, "alteration, mutilation, destruction, obliteration, or removal." In the statute, those acts bear on the labeling of the package. Nor could it be otherwise. Destruction of the product itself is not an offense under the Federal Food, Drug and Cosmetic Act. Alteration of a food is not a crime *per se*. *Sullivan* teaches that, even under the original section prohibiting misbranding only, the rule of *ejusdem generis* did not require confining "other act[s] * * * [resulting in the article] being misbranded" to those which are like removing or defacing the labeling. There is plainly no warrant for invoking the rule here, in a case involving the new adulteration offense.

In sum, Section 301(k) very clearly condemns acts which result in adulteration of the regulated product, after its interstate shipment, without reference to the unrelated labeling offenses, albeit the latter, to be sure, are proscribed by other words in the same section. It condemns acts of adulteration, not merely *other* acts like the listed label-defacing offenses. Any other reading runs against the plain meaning of the words and nullifies the congressional purpose to make adulteration a separate offense. We cannot improve on what Congress said for itself in unambiguous terms (H. Rep. No. 807, 80th Cong., 1st Sess., pp. 3-4):

> The present section 301(k) forbids, first, certain acts with respect to the labeling of an article, and, second, "any other act with respect to" the article itself which results in its being misbranded. * * * adulteration more often occurs as

a result of acts done to or with respect to the article itself. Since the section already contains the broad phrase "any other act with respect to" the article, and since this phrase is not limited by the preceding enumeration of forbidden acts with respect to the labeling, there is no need in making it applicable to adulteration, to change the existing statutory language in this regard.

It seems clear that under the subsection as now in force the rule of ejusdem generis would not apply in interpreting the words "or the doing of any other act * * *", and it is even more clear that this rule will not apply in the interpretation of the subsection as amended by this bill.

B. *Section 301(k), read in context, condemns holding food under insanitary conditions which may lead to contamination.*

The preceding discussion disposes of the judgment below, which restricts the scope of the section as it applies to adulteration by a wholly inappropriate resort to the rule of *ejusdem generis*. There may remain a question, however, as to what "acts" resulting in adulteration of the product are proscribed. The short answer is that *any and every* act which produces the prohibited consequences is condemned. Indeed, the House Committee Report on the amendment to the Section (H. Rep. 807, *supra*, at p. 6) states:

> It is the intention of the committee that * * * the amendments are to be applied to any factual situation in which the courts find their application to be constitutional * * *

In view of the detailed definition of "adulteration," particularized for each of the classes of commodities

regulated (see § 402, 21 U.S.C. 342 (food); § 501, 21 U.S.C. 351 (drugs and devices); § 601, 21 U.S.C. 361 (cosmetics)), that reading would not render the statute impermissibly vague and indefinite, as the district judge apparently thought. But, for present purposes, we need not explore all the possibilities. For it is clear beyond peradventure that the particular act charged here—holding food under insanitary conditions—is within the scope of the prohibition.

As the trial judge in effect acknowledged, there is no doubt that, in enacting the amendment to Section 301(k) which added the adulteration offense, Congress *intended* to prohibit the conduct in suit. That was one of the principal purposes of the 1948 amendment. It was provoked, in part at least, by the decision of the Court of Appeals for the Ninth Circuit in *United States* v. *Phelps Dodge Mercantile Co.*, 157 F. 2d 453, certiorari denied, 330 U.S. 818, that the original Act did not authorize the seizure for condemnation of food that became adulterated in a wholesale grocery warehouse after the completion of its interstate journey.[1] The testimony at the hearings on the proposed legislation focused on the applicability of Section 301(k), as amended, to the local warehouseman who subjected goods to insanitary storage after interstate shipment and before sale to the ultimate consumer. Hearing before a Subcom-

[1] In May 1947, the Fifth Circuit decided the *Sullivan* case adversely to the government, 161 F.2d 629, reversed, 332 U.S. 689. The bill which ultimately became law was designed also to meet possible difficulties created by that decision. This explains the addition of the parenthetical clause "(whether or not the first sale)."

mittee of the House Committee on Interstate and Foreign Commerce, 80th Cong., 1st Sess., on H.R. 3128, June 12, 1947, pp. 4-7, 18-19. The House Committee Report (H. Rep. 807, *supra*, at p. 3) noted that the amended Section would "penalize, among other acts resulting in adulteration or misbranding, the act of holding articles under insanitary conditions whereby they become contaminated with filth or rendered injurious to health." And during the Senate hearings [2] on the amendment, the Associate Commissioner of Food and Drugs explained (p. 17):

> Under the bill as enacted here, if there was a definite showing of violation on the part of the warehouse which had this material stored, a prosecution of them criminally for doing the act of holding under these insanitary conditions, which result in adulteration could ensue.

There is no doubt what Congress *meant* to say. The constitutional question, however, is whether it said all it meant. We submit it did. Section 301 (k), fairly read, gives ample warning that holding food under known insanitary conditions which may result in contamination is condemned.

Section 301(k) prohibits all acts which result in adulteration of the product. If there were nothing more, that sweeping prohibition might leave one somewhat at sea. But the subsection does not stand alone. As already noted, "adulteration" is particularly defined elsewhere in the Act. What is more,

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[2] Hearing before a Subcommittee of the Committee on Interstate and Foreign Commerce, United States Senate, on S. 1190 and H.R. 4071, 80th Cong., 2d Sess., April 17, 1948.

with special reference to food, the statute in effect details the acts which lead to adulteration. See § 402, 21 U.S.C. 342. Notably, the statute declares "adulterated" any food which "has been prepared, packed, or held under insanitary conditions, whereby it may have become contaminated with filth * * *" § 402(a)(4), 21 U.S.C. 342(a)(4). It follows that one of the act[s] * * * [which] results in [food] being adulterated" within the meaning of Section 301(k) is "holding" or storing it in an insanitary place where it may become contaminated. The warning is plain on the face of the statute. Anyone who reads

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[1] While about 20% of the criminal cases initiated each year involve adulteration of products held for sale after shipment in interstate commerce, only two cases have produced written opinions on the issue involved in this case. In *United States* v. *International Exterminator Corp.*, 294 F. 2d 270, the Court of Apepals for the Fifth Circuit reversed the dismissal of a complaint for injunction involving storage warehouse adulteration. The charge was that the exterminator caused the stored interstate food to be adulterated by placing a highly poisonous rodenticide 1080 in uncovered bait cups in close proximity to it, with the result that the food was held under insanitary conditions whereby it may have been rendered injurious to health. In the other case, *United States* v. *New London Paper & Supply Co.* (D. Conn., 1959), reported in Kleinfeld & Kaplan, Federal Food, Drug, and Cosmetic Act 1958-1960, C.C.H., p. 39, 41, Judge Smith rejected the defendants' contention that Section 301(k) "requires something more affirmative than mere holding in a place where without the knowledge of defendants insects exist." Citing the legislative history we have discussed above, Judge Smith held:

> In an effort to protect the public health, the warehouseman is required at his peril to see that foodstuffs moving in interstate commerce or held for sale after such movement are not exposed to contamination. * * *

the appropriate definitional section will know precisely what acts resulting in adulteration are condemned by Secetion 301(k). Accordingly, there can be no argument that the provision is unconstitutionally vague.[4]

C. *Section 301(k) applies to public warehousemen.*

One last argument can be quickly disposed of. Appellee's principal contention below was that, since it had mere possession of, but not title to, the food, the contamination did not occur while the food was "held for sale". The suggestion seemed to be that the criminal prohibitions apply to the contamination of food in the hands of a seller, but not in the hands of a public warehouseman. Under that construction the warehouseman storing his own food for future sale would be subject to the Act, but the public warehouseman would not.

There is no warrant in the language of the statute for that result. Section 301(k) does not say "while held for sale *by the owner*." Perhaps the owner of the product who causes it to be stored in a place

[4] It seems obvious enough that storing bags of rice and packages of hamburger mix and breading mix in a building "accessible to rodents, birds and insects" which results in the product being contaminated with "rodent excreta," "rodent urine," "insect larvae," "insect pupae," or "insect cast skins," as charged in the indictment (R. 1-9), is a holding of food "under insanitary conditions whereby it may have become contaminated with filth," within the statute. But the sufficiency of the indictment is not challenged here. The only question presented on this direct appeal is whether the statute forbids a holding under insanitary conditions which may result in contamination with filth.

which he knows to be insanitary is equally liable. But that surely does not exempt the warehouseman. Plainly, public protection does not depend upon the "technicalities of the law of sales regarding passing of title". *Barnes* v. *United States*, 142 F. 2d 648, 651 (C.A. 9); cf. *Santa Cruz Fruit Packing Co.* v. *National Labor Relations Board*, 303 U.S. 453; *Arner* v. *United States*, 142 F. 2d 730 (C.A. 1), certiorari denied, 323 U.S. 730. As this Court said in *United States* v. *Dotterweich*, 320 U.S. 277, 283:

> The Act is concerned not with the proprietory relation to a misbranded or an adulterated drug but with its distribution. * * *

The statutory provision "while * * * held for sale" not only covers, but was fully intended to apply to the holding of food and drugs by all persons who might handle them before their delivery to the ultimate consumer. *United States* v. *Kocmond*, 200 F. 2d 370 (C.A. 7), certiorari denied, 345 U.S. 924; *United States* v. *Wine Gallons*, 121 F. Supp. 735 (W.D. Mo.); *United States* v. *10 Cartons*, 152 F. Supp. 360 (W.D. Pa.). As the Senate Committee report (S. Rep. 1221, 80th Cong., 2d Sess., p. 3) says, the prohibition applies "while it is stored pending further processing or disposition to consumers".

Congress has undoubted power to regulate activities of wholesale grocery storage where the food has previously passed in interstate commerce. *United States* v. *Sullivan*, *supra*; *McDermott* v. *Wisconsin*, 228 U.S. 115. *Cf. United States* v. *Walsh*, 331 U.S. 432. Convinced that inward integrity of the pack-

age is of equal importance with outward compliance, Congress condemned insanitary storage of food. It made its meaning unmistakably plain. There can be no warrant for failing to carry out that mandate.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be reversed.

Respectfully submitted,

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AUGUST 1963.

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No. 92

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

UNITED STATES OF AMERICA, *Appellant*

v.

WIESENFELD WAREHOUSE COMPANY, *Appellee*

On Appeal From the United States District Court
For The Southern District of Florida

BRIEF FOR THE APPELLEE

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CITATIONS

IN THE

Supreme Court of the United States

OCTOBER TERM, 1963

No. 92

UNITED STATES OF AMERICA, *Appellant*

v.

WIESENFELD WAREHOUSE COMPANY, *Appellee*

On Appeal From the United States District Court For The Southern District of Florida

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OPINION BELOW

The order of the District Court from which the United States has appealed is reported at 217 F. Supp 638 (SD. Fla., 1962).

QUESTION PRESENTED

It is submitted that the Appellant's statement of the "Question Presented" (Appellant's Brief, page 2) goes far beyond the record in this case and presents a hypothetical question for decision by this Court. For that reason we have

restated the Question Presented to conform to the record, as follows:

> Whether Section 301(k) of the Federal Food, Drug and Cosmetic Act condemns the holding of food (after interstate shipment and before sale to the ultimate consumer) by a public storage warehouseman in a building which is "accessible to" pests where such food, in fact, becomes adulterated.

STATEMENT

The Appellee, a public storage warehouseman, was charged by criminal information with six violations of Section 301(k) of the Federal Food, Drug and Cosmetic Act, (21 U.S.C. 331(k)). The six counts differed only with respect to the particular shipment or product involved. In substance, each count charged (1) that the Appellee had received an article of food which had been shipped in interstate commerce; (2) that while the food was being held for sale; the Appellee caused it to be held in a building which was "accessible to" pests, thus exposing it to contamination with filth; and (3) that the food thereby became adulterated.

The District Court granted Appellee's motion to dismiss the information and ruled that "the statute, as it is presently written, is too vague and indefinite to apply to the mere act of 'holding' goods" in a building which is accessible to pests (R 11-12). It is from the judgment of dismissal that the government appealed.

ARGUMENT

I. *The scope of this appeal is limited to a determination of whether or not the District Court was correct in its construction of the statute as applied to its construction of the information.*

The government in its brief, has assumed that the information upon which the prosecution is founded, charges that the Appellee held food under *known insanitary* conditions, thus causing it to become contaminated. We respectfully suggest, however, that the only act alleged in the information to have been committed by Appellee was that of holding food in a building which was *accessible to* pests (R 2-8). The information does not charge, as the Appellant assumes, that the Appellee held food under "known insanitary conditions."

The judgment of the District Court from which this direct appeal has been taken clearly discloses that Court's construction of the information. The Court, in summarizing the allegations of the information, said:

> The information alleges that adulteration was caused by the Defendant's act of holding certain food in its warehouse, which was accessible to rodents, birds and insects. (R. 11).

The District Court held that this act of holding food in a building accessible to pests was not a prohibited act within the meaning of Section 301(k).

We are not concerned here with the correctness of the District Court's construction of the information, but rather with its application of the law to its construction of the information. The jurisdiction of this Court on direct appeal is limited by 18 U.S.C. Section 3731, to determination of whether or not error was committed by the District Court in its construction of Section 301(k), and in its ruling that the statute does not make criminal the holding of food in a building which is accessible to pests. *United States v. Borden Co.* 308 U.S. 188, 84 L.Ed. 181 (1939); *United States v. Keitel*, 211 U.S. 370, 53 L.Ed. 230 (1908); *United States v. Jones*, 345 U.S. 377, 97 L.Ed. 1086 (1953). In *United States v. Jones*, supra, this Court correctly summarized the limits of its jurisdiction on direct appeal, saying:

> The Criminal Appeals Act . . . strictly limits the scope of our jurisdiction over this appeal. We may only entertain questions relating to the construction of [the statute] and its applicability to this information. We cannot construe it de novo, for we are bound by the District Court's construction. 345 U.S. at 378, 97 L.Ed. at 1087.

Furthermore, Rule 10 of the Revised Rules of the Supreme Court of the United States limits the scope of an appeal to those questions "set forth in the notice of appeal or fairly comprised therein . . ." The notice of appeal in this case states the Question Presented as:

> Whether an information which alleges that a public storage warehouse company . . . *caused the food to be held in a building that was accessible to rodents, birds and insects and* thereby caused the food to be exposed to contamination from these sources; and *that the act of causing the food to be so held* resulted in the foods being adulterated . . . charges "the doing of any other act" which constitutes a violation of 21 U.S.C. 331(k). (R. 16) (Emphasis supplied.)

This is a fair statement of the Question Presented here, but it does not encompass the Question Presented by the Appellant's brief.

The government argues that an information which alleges a holding of food under known insanitary conditions is a crime. We submit that the information alleges only a holding of food in a building "accessible to" pests.

It should be emphasized that the distinction which we urge is more than one of words. Under the information as construed by the District Court, the only proof of guilt required of the government would be (1) that food was held in a building which was accessible to pests, and (2) that it, in fact, became contaminated with a filthy substance. The Appellant's argument assumes that it would be necessary for the government to prove a known insanitary condition within the warehouse. This argument which is advanced by

the government for the first time in this Court, ignores both the charge contained in the information and the construction of that charge which was adopted by the District Court.

It is submitted that the scope of this appeal must be limited to a consideration of whether or not the mere holding of food in a building which is accessible to pests is *per se* a crime.

II. *Section 301(k), when properly construed, does not apply to holding of food in a building which is accessible to pests.*

The argument presented by the Appellant assumes that if a building is accessible to pests it is *per se* insanitary. We respectfully submit that any and every building is "accessible to" pests, and if we are to accept the Appellant's argument and carry it to its logical conclusion every building (except one which is hermetically sealed) would be insanitary as a matter of law. A warehouse is peculiarly accessible to pests because of the large doorways made necessary by the nature of its business, and because those doorways must stand open during the normal business hours when merchandise is being taken into and out of the warehouse. There is no known method of making such a building "inaccessible" to pests. It does not follow, however, that such a building is *per se* insanitary.

The effect of the Appellant's argument would be to impose criminal liability with its attendant fines and imprisonment upon any person having possession of food which has become adulterated. This criminal responsibility would exist, according to Appellant, notwithstanding freedom from fault or knowledge of possessor of that food. It was this position of the Appellant that evoked the comment of the District Court:

> Congress may have intended the construction advocated by the prosecution, however, the statute as it is

written, is too vague and indefinite to apply to the mere act of "holding" goods. (R. 12).

The District Court, in an effort to avoid the question of whether or not the statute was unconstitutionally vague and indefinite, instead adopted a strict construction of the statute so as to exclude the act alleged to have been committed by the Appellant. We submit that the District Court was correct and that common sense in the reading of the statute commands that it not be construed in such a way as to make a criminal of every warehouseman in the land.

A broad construction of Section 301(k) is perhaps warranted by its purpose and its legislative history, but there is nothing in that purpose or history, or in the act itself, to indicate that Congress intended to inflict severe criminal penalties upon a person merely holding food if that food becomes contaminated.

The Appellant, on page 10 of its brief, argues:

> "There is no doubt what Congress *meant* to say . . . Section 301(k), fairly read, gives ample warning that holding food under known insanitary conditions which may result in contamination is condemned."

We have no quarrel with this construction of the statute unless the Appellant is equating a building "which is accessible to pests" to a "*known insanitary* condition." It is perhaps the contention of the Appellant that this Court should take judicial notice of the fact that since all buildings are accessible to pests, that condition must be "known" to everyone; and further, that mere accessibility of the building to pests, renders it insanitary. If this is so, the government's "fair reading" of the statute again becomes unfair and untenable.

It is submitted that fairly read Section 301(k) which by its terms requires the doing of an act with respect to food while it is held for sale, would warn a person of normal intelligence that if he knowingly *does* something to a food that

he is holding for sale, criminal responsibility may fall on him if what he does may reasonably be expected to result in contamination of the food.

In the construction of the statute the phrase "the doing of any other act" follows an enumeration of active verbs—"alteration," "mutilation," "destruction," "obliteration" or "removal." All of these verbs imply some affirmative action on the part of the actor. The term "doing of any other act" also implies some action or activity—not a mere passive holding in a building which is merely accessible to pests. Contrary to the argument of the Appellant, the Court below did not hold, and it is not now, and never has been the contention of the Appellee that the term "the doing of any other act" is restricted to acts related to labeling. We contend only that a person of ordinary intelligence, in reading Section 301(k) would not be warned that criminal punishment would be inflicted upon him for passively holding food belonging to his customer if that food became contaminated while in his possession; that the doctrine of *ejusdem generis*, which is at best an aid to construction and a guide to understanding, requires that some positive act causing adulteration be committed by the person holding food for sale.

Furthermore, Section 301(k) is not applicable unless the food is being "held for sale." The statute is silent as to who must hold the food for sale. It is submitted that an ordinary and normal construction of the statute would require that the person charged with the crime hold it for sale.

A public warehouseman must take and hold merchandise belonging to his customer in the ordinary course of his business without knowing what the customer intends to do with it. It is apparently the Appellant's position that criminal responsibility must rest upon the intention of a third party. If the customer intends to consume food which he stores in the warehouse, the Act has no application; but if the customer intends to sell it, the warehouseman is subject to fines

and imprisonment. A simple change of another's intention over which the warehouseman has no control can make him guilty of a crime.

It is submitted that the term "held for sale" in ordinary usage, implies a degree of ownership and something more than naked possession. As this Court held in *McFeely v. Commissioner*, 296 U.S. 102, 80 L.Ed. 83 (1935):

> In common understanding to hold property is to own it, 296 U.S. at 107, 80 L.Ed, at 88.

See also 40 C.J.S. 406, *Howell v. Commissioner* (5th Cir. 1944), 140 F.2d 765. It is the "common understanding" of the term which should govern its meaning in the construction of the statute. We concede that technicalities of the law of property should not determine the applicability of the statute with respect to the seizure of adulterated food, or with respect to prosecutions for shipping adulterated foods in interstate commerce where the statute does not require that the food be "held for sale" (which proposition is supported by the authorities cited by Appellant on page 13 of its brief). It does not follow, however, that criminal punishment should be inflicted upon one having only naked possession of food with no proprietory interest in, and no control over its disposition, where the statute specifically requires that the food be "held for sale."

It is submitted that the District Court was correct in adopting a strict construction of the statute to exclude the act of holding food under the circumstances alleged.

III. ***Section 301(k) as applied to the acts of Appellee is too vague, indefinite and uncertain to be enforceable as a criminal statute.***

The District Court held that Section 301(k) would be unconstitutionally vague if construed in the manner advocated by the prosecution.

The question of vagueness or uncertainty in criminal

statutes has been considered by this Court in a multitude of cases from which has been derived a series of tests or standards of construction which should be applied in determining whether or not a criminal statute is so vague as to offend the provisions of the Fifth and Sixth Amendments to the Constitution of the United States. In *Connally v. General Construction Co.*, 269 U.S. 385, 70 L.Ed. 322 (1926), this Court said that in order for a penal statute to be valid,

> The crime, and the elements constituting it, must be so clearly expressed that the ordinary person can intelligently choose, *in advance*, what course it is lawful for him to pursue. Penal statutes prohibiting the doing of certain things, and providing a punishment for their violation, should not admit of such a double meaning that the citizen may act upon the one conception of its requirements and the courts upon another. 269 U.S. at 393, 70 L.Ed. at 329.

In *Lanzetta v. New Jersey*, 306 U.S. 451, 83 L.Ed. 888 (1939), this Court said:

> No one may be required at peril of life, liberty or property to speculate as to the meaning of penal statutes. All are entitled to be informed as to what the State commands or forbids. . . . And a statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process of law. 306 U.S. at 453, 83 L.Ed. at 890.

These are the general rules to be applied. It is submitted that a statute such as the one here involved, which in general terms prohibits any act which *may* have an undesirable result, regardless of intent and purpose of the actor, is unconstitutionally vague.

This Court, in *United States v. L. Cohen Grocery Co.*, 255 U.S. 81, 65 L.Ed. 516 (1920), held that a statute which regulated prices and made criminal the wilful charging of an

unjust or unreasonable rate in handling necessaries, was not sufficiently definite to withstand an attack on the grounds of vagueness. This Court held that a standard of guilt must be set forth in the statute and Congress had no power to delegate to the courts and juries the duty of fixing such standards. The Court pointed out that:

> " . . . to attempt to enforce the section would be the exact equivalent of an effort to carry out a statute which in terms merely penalized and punished all acts detrimental to the public interest when unjust and unreasonable in the estimation of the court and jury." 255 U.S. at 89, 65 L.Ed. at 520.

In the *Cohen* case the statute required a wilful act on the part of the accused. Here the statute as construed by the prosecution simply punishes any act which might have the undesirable consequence of adulterating food.

More recently, in *United States v. National Dairy Products Corp.*, — U.S. —, 9 L.Ed. 2d, 561 (1963), this Court upheld the validity of Section 3 of the Robinson-Patman Act which prohibits the sale of goods at "unreasonably low prices for the purpose of destroying competition." The Court held that the predatory intent required of a person charged under that statute afforded sufficient notice and warning of the prohibited conduct.

> . . . We think the additional element of predatory intent alleged in the indictment and required by the Act provides further definition of the prohibited conduct. We believe the notice here is more specific than that which was held adequate in *Screws v. United States*, 325 U.S. 91, 89 L.Ed. 1495, 65 S.Ct. 1031, 162 ALR 1330 (1945) in which a requirement of intent served to "relieve the statute of the objection that it punishes without warning an offense of which the accused was unaware." 9 L.Ed. 2d at 567.

In the instant case, the information contained no reference to intent which, if required, might serve to "relieve the

statute of the objection that it punishes without warning an offense of which the accused was unaware."

If Section 301(k) is construed to punish any act or omission which may have the undesirable consequence of contaminating food, every person coming in contact with food will be required to speculate as to what acts may be prohibited and what omissions will be punished. The statute, it is submitted, does not define with the required particularity the standards of conduct expected and demanded, and therefore, if construed as contended by the Appellant, is unconstitutionally vague and indefinite.

CONCLUSION

In conclusion, it should be noted that the United States has ample power and authority to protect the stream of interstate commerce from pollution by adulterated foods through a vigorous use of the seizure provisions of Section 304(a) of the Federal Food, Drug and Cosmetic Act (21 U.S.C. 334(a)). That section of the Act clearly and unequivocally grants to the government the power to seize and destroy adulterated foods in the stream of commerce. But the government here seeks to impose severe criminal sanctions against a bailee of food whose only fault is that his building is "accessible to" pests, and who is, by the very nature of his business powerless to avoid that condition regardless of what precautions he takes to protect against invasion by such pests.[1]

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1 The government concedes that in the fifteen years that Section 301(k) has been in effect there have been no reported criminal prosecutions for activity even re-related to that alleged in the information. Of the two cases cited by the government (Appellant's Brief, page 11 fn 3) as bearing on the question, one is a civil proceeding wherein the United States sought an injunction against poisoning of food by an exterminator (*United States v. International Exterminator Corp.*, (5th Cir., 1961) 294 F. 2d 270), and the other, an unreported District Court case involving a prosecution of wholesale grocery warehouse for storing food near insect-infested food after repeated warnings from the inspector. Neither of these cases even approach the broad construction of the statute which the government seeks here. Furthermore, in the fifteen years of the statute's existence, the Department of Health, Education and Welfare, and its predecessors, have not seen fit to propound any administrative guidelines or regulations bearing on the Question Presented by the prosecution..

We again point out that notwithstanding the broad statements in the government's brief, the information as construed by the District Court does not allege that Appellee is a wholesale grocery warehouse (which it is not), nor the existence of any insanitary condition in the Appellee's warehouse; nor does it allege any knowledge on the part of the Appellee of the existence of pests in the building; nor that the Appellee did anything with respect to the food other than hold it in a building which was accessible to pests.

Under the construction of Section 301(k) advocated by the Appellant at any time a food product is attacked by insects or pests, the possessor of the food has committed a crime. The accessibility of the place where the food is stored to insects is proved by the fact that the food is attacked, and adulteration of the food is proved by the fact that the food was held in a place accessible to insects. If absolute criminal liability was intended to be imposed by Congress under such circumstances the language of the statute and its legislative history do not convey that intention.

It is submitted that the District Court was correct in its holding that the statute was inapplicable to facts alleged in the information and for the reasons stated, the judgment of the District Court should be affirmed.

Respectfully submitted,

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PROOF OF SERVICE

I, Clarence G. Ashby, attorney for Wiesenfeld Warehouse Company, Appellee herein, and a member of the bar of the Supreme Court of the United States, hereby certify that on the.....day of October, 1963, I served copies of the foregoing Brief for the Appellee, the United States of America, by mailing copies thereof in a duly addressed envelope with airmail postage prepaid to Archibald Cox, Solicitor General, United States of America, Department of Justice, Washington 25 D. C., attorney of record for Appellant.

Attorney for Appellee